

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/20

Date: 27 July 2021

PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

Public

**Decision on the Defence Request for Leave to Appeal the Decision on the
Confirmation of Charges against Paul Gicheru**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr James Stewart

Counsel for the Defence
Mr Michael G. Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court (the ‘Court’) issues this Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges against Paul Gicheru.

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Mr Gicheru and Philip Kipkoech Bett for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).¹
2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands.
3. On the same day, the President of the Pre-Trial Division constituted the present Pre-Trial Chamber A (the ‘Chamber’)² pursuant to rule 165(2) of the Rules of Procedure and Evidence (the ‘Rules’) (relating to Article 70 proceedings), as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (the ‘Provisional rule 165 of the Rules’), and regulation 66*bis*(1) of the Regulations of the Court, which was adopted and entered into force on the same day.
4. On 12 November 2020, the Chamber issued the ‘Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence’ (the ‘OPCD Request’ and ‘OPCD’ respectively).³ The Chamber granted leave to the OPCD to submit the observations set out in the OPCD Request.
5. On 10 December 2020, the Chamber issued the ‘Decision on the Applicability of Provisional rule 165 of the Rules of Procedure and Evidence’.⁴ The Chamber found that Provisional rule 165 of the Rules was applicable to the present proceedings and that it

¹ Decision on the ‘Prosecution’s Application under Article 58(1) of the Rome Statute’, ICC-01/09-01/15-1-Conf-Exp (a public redacted version was notified on the same day, *see* [ICC-01/09-01/20-1-Red](#)).

² [Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case](#), ICC-01/09-01/20-32.

³ [ICC-01/09-01/20-43](#). *See also* [OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165’ on behalf of the Office of the Public Counsel for the Defence](#), 11 November 2020, ICC-01/09-01/20-40.

⁴ [ICC-01/09-01/20-61](#). *See also* [OPCD Submissions on the Inapplicability of Provisional Rule 165](#), 17 November 2020, ICC-01/09-01/20-47; [Prosecution’s Response to ‘OPCD’s Submissions on the Inapplicability of Provisional Rule 165’](#), 20 November 2020, ICC-01/09-01/20-52; [Paul Gicheru’s Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165](#), 25 November 2020, ICC-01/09-01/20-53.

has been properly constituted as a chamber composed of one judge to exercise the functions and powers of Pre-Trial Chamber A in the present case.⁵

6. On 23 December 2020, the Chamber issued the ‘Decision on the “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”’.⁶ The Chamber granted the OPCD Request in relation to the three issues raised with the first issue and the third issue as reformulated by the Chamber.⁷

7. On 8 March 2021, the Appeals Chamber issued the ‘Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled “Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence”’ confirming the Chamber’s decision on the applicability of Provisional rule 165 of the Rules.⁸

8. In its judgement, the Appeals Chamber noted in particular:

Regarding the exclusion of the procedural possibility of interlocutory appeals under article 82(1)(d) of the Statute, the Appeals Chamber underlines that the Pre-Trial and Trial Chambers are required to ensure that the rights of the suspect or accused person are respected. Any concern that they may have failed in this duty may be raised before the Appeals Chamber in a final appeal and any necessary remedy may be applied at that stage. Therefore, the Appeals Chamber concludes that the elimination of the procedural possibility of interlocutory appeals under article 82(1)(d) of the Statute does not vitiate any right vested in the parties generally or in the accused in particular.⁹

9. On 15 July 2021, the Chamber issued the Decision on the confirmation of charges against Paul Gicheru.¹⁰

⁵ [ICC-01/09-01/20-61](#), p. 22.

⁶ [ICC-01/09-01/20-68](#). See also [Request for leave to appeal the Decision on the Applicability of Provisional Rule 165](#), 17 December 2020, ICC-01/09-01/20-63 (filed on 16 December 2020, notified on 17 December 2020); [Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165](#), 18 December 2020, ICC-01/09-01/20-64; Prosecution, [Prosecution’s Response to OPCD’s ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’](#), 21 December 2020, ICC-01/09-01/20-66.

⁷ [ICC-01/09-01/20-68](#), paras 24-43.

⁸ [ICC-01/09-01/20-107](#), para. 117.

⁹ [ICC-01/09-01/20-107](#), para. 112 [internal references omitted].

¹⁰ ICC-01/09-01/20-153-Conf (a public redacted version was issued on the same day, see [ICC-01/09-01/20-153-Red](#)).

10. On 21 July 2021, the Defence submitted its ‘Request for Leave to Appeal the Decision on the Confirmation of Charges against Paul Gicheru’¹¹ (the ‘Defence Request’). In this request, the Defence seeks leave to appeal pursuant to article 82(1)(d) of the Statute.

11. On 23 July 2021, the Prosecutor filed his response.¹²

12. The Chamber notes that, as mentioned above, the Appeals Chamber confirmed the applicability of Provisional rule 165 of the Rules to the present proceedings.¹³ The said rule 165 of the Rules reads, in relevant part, as follows: ‘Articles 39(2)(b), 53, 57(2), 59, 76(2) and 82(1)(d), and any rules thereunder, *shall not apply*.’¹⁴

13. Therefore, the Chamber finds that the law is clear on the fact that the Defence has no legal basis to submit a request for leave to appeal pursuant to article 82(1)(d) of the Statute,¹⁵ which does not apply to the present proceedings.

¹¹ ICC-01/09-01/20-156.

¹² Prosecution’s Response to “Request for leave to appeal the Decision on the Confirmation of Charges against Paul Gicheru”, ICC-01/09-01/20-157.

¹³ [ICC-01/09-01/20-107](#), para. 117.

¹⁴ Emphasis added.

¹⁵ See Defence Request, para. 14 (‘it remains unsettled whether [the application of Provisional rule 165 of the Rules] disallow the right to interlocutory appeal the Decision on the Confirmation of Charges’).

FOR THESE REASONS, THE CHAMBER HEREBY

DISMISSES *in limine* the Defence's request for Leave to Appeal the Decision on the Confirmation of Charges against Paul Gicheru.

Done in both English and French, the English version being authoritative.



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated 27 July 2021

At The Hague, The Netherlands